UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV
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ATLANTA, GEORGIA 30365

JAN 16 1992

Honorable George G. Kirkpatrick
The Florida Senate
414 Senate Office Building
Tallahassee, Florida 32399-1100

Honorable Hurley W. Rudd
The Florida House of Representatives
211 House Office Building
Tallahassee, Florida 32399-1300

Dear Sirs:

This letter is in response to your letter of October 8, 1991, to William K. Reilly, Administrator of the Environmental Protection Agency (EPA) regarding Clean Water Act (CWA) Section 404 assumption by the State of Florida. As you know, the letter was forwarded to me for response. I apologize for the length of time it has taken for us to respond to your request. The questions asked in your letter raised complex legal questions that required considerable legal analysis in order to answer. We have now completed that legal analysis and are providing in this letter a response that should be of assistance to the State in identifying management options for wetlands protection programs.

Since Water Management Districts (WMDs) are regional agencies or special districts of the State, and are not considered under State law to be "state agencies" according to several Florida Attorney General (AG) statements, it was necessary in our legal analysis to first determine if the WMDs could meet the definition of "state agencies" for the purpose of Section 404 assumption. A review of the legislative history of the Clean Water Act and the preamble to the authorizing federal regulations (C.F.R. Part 233) was conducted to determine if the intent of the term "State agencies" could include the WMDs. This review determined that there is no special meaning or requirements associated with the term "State agency", and that Water Management Districts may be considered "State agencies" for the purpose of Section 404 assumption. Therefore, this designation is not a legal impediment to the WMDs receiving direct authorization from EPA as long as the specific program requirements are met.

Before I turn to the specific scenarios laid out in your October 8 letter, let me clarify that whatever form the final program submittal takes, whether assumption by the Florida Department of Environmental Regulation (FDER) or the WMDs or some combination thereof, the complete state program must meet all the substantive requirements of the CWA and Part 233. My staff has had some preliminary discussions with FDER regarding some of the issues that would need to be addressed prior to the State assuming the program. A list of these preliminary assumption issues is enclosed. Other issues would likely be identified through a more thorough comparison of the State's various legislative and regulatory authorities with that of the CWA and associated regulations.

The following section responds to each of the four scenarios in your October 8 letter, and how the scenario would affect the State's ability to assume the Section 404 program.

(1) Assumption of the program by the state water quality agency, in this case FDER, is the traditional approach for CWA programs, and is clearly an acceptable option. Since this option involves only one agency, it offers the least in complexity, and probably offers fewer statutory and regulatory modifications than one of the combined options listed below. It is also the one most familiar to EPA and, therefore, could be the most expedient to implement.

(2) More than one state agency can share implementation of the 404 program as long as the agencies' programs as a whole constitute a complete state program. This option is, therefore, a possibility for 404 assumption to Florida. The option of multiple agencies assuming the program carries with it specific program requirements, including a single program submittal from the state. This submittal would include one program description demonstrating that a complete statewide program would be accomplished including authority for all dredge and fill activities in all assumable waters of the state. The program description would include the responsibilities and authorities of the individual agencies (WMDs and FDER), and how the agencies will coordinate administration and evaluation of the program. For example, among other requirements, 40 C.F.R. § 233.12(d) requires the Attorney General's statement to include a specific certification relating to multiple agencies, and § 233.13 and § 233.14 require the Directors of each agency administering the State program to be a party to the Memorandum of Agreement with EPA, and the Memorandum of Agreement with the Corps of Engineers. Also, since the program is viewed as a single entity under the regulations, the entire program would have to be withdrawn if any one agency failed to meet the requirements of the regulations.

This option is obviously highly complex and would require considerable program development by the State and considerable review by EPA in order to determine that the submittal is a complete program. It gives EPA some concern regarding consistency in implementation of the program across the State. We would be willing to work with the State on this option, if this is determined to be the best management option for the State. It is not, however, EPA's preferred option for reasons of complexity and resources involved in EPA's oversight responsibilities for the State program.

(3) The state agency assuming the 404 program may delegate its responsibilities for the 404 program to other state agencies as long as the state director retains a sufficient amount of control and accountability to satisfy that compliance with our regulations is achieved. Again, this option is a possibility for the State. The State would have to describe in the program description this intended delegation of authority, and how control and accountability would be achieved. The Memorandums of Agreement with EPA and the Corps would have to spell out the proposed delegation arrangement. This option would be more preferable to EPA than the number 2 option in that one state agency has primary responsibility for the program, and EPA's overview would be directed to this agency.

(4) This option is similar to the number 3 option with the difference that isolated wetlands would be regulated under WMD authority, rather than under FDER rules. Again, there is no legal impediment to this option; however, the program as a whole must be a complete program covering all dredge and fill activities in all assumable waters. According to the regulations, a state may not assume authority for a partial 404 program. Under this scenario, the WMDs would have to adopt dredge and fill authority for isolated wetlands substantially similar to the federal authority before such an option could be approved. This scenario contemplates two different sets of regulations, one for each of the two different types of wetlands. While this is a State decision, this option would seem to offer potential for confusion on the part of the regulated community and cause difficulties in program implementation.

In conclusion, there is no legal impediment to any of the proposed scenarios, assuming the program submittal includes a complete program, including all proposed delegations, statutes, rules, and regulations to be used to implement the program. There are, of course, options that EPA favors over others, specifically number 1 or number 3. This is, however, a State decision. Our interest is in working with you to develop an assumable program, one that is acceptable and workable within the State.

LIST OF PRELIMINARY ISSUES NEEDING TO BE ADDRESSED
FOR SECTION 404 ASSUMPTION BY STATE OF FLORIDA

- FDER's definition of wetlands, and therefore its scope of jurisdiction, is not as inclusive as the federal definition or scope of jurisdiction. Legislative and regulatory changes would be necessary.

- The State's program must assure compliance with the 404(b)(1) guidelines. The existing FDER program lacks a practicable alternatives test." Legislative and regulatory changes would be necessary.

- The 404(b)(1) guidelines contain a recapture clause for agriculture and silviculture whereby these activities may be regulated if modifications convert the wetland to an upland. The FDER's program lacks this recapture provision. Also, FDER's program exempts most agriculture and silviculture activities from regulation. The five WMDs, however, regulate some agricultural activities, primarily those related to water quantity. A further analysis of the State's regulation of these activities is necessary to determine changes necessary to qualify for assumption.

- The CWA specifically requires that 404 permits issued under a state-assumed program "are for fixed terms not exceeding five years" [Section 404(h)(1)(A)(ii)]. State legislation allows permits of longer duration (e.g. 25 years) to be issued. (The CWA contains no provision limiting the permit duration for Corps-issued permits; hence, more flexibility for federal permits.) The State will have to change their statute to be consistent with the CWA, or Congress will have to change this requirement in the CWA during the upcoming CWA reauthorization.

- Florida's statute requires that the State issue a permit decision within 90 days of receiving a complete permit application. If within 90 days a decision has not been reached, a permit by default is automatically issued based on the permit application. EPA cannot approve a state program under which permits could be issued by default.

- By statute, EPA has 90 days to provide comments to the State on permits which receive EPA review under the oversight process. During this 90-day clock, EPA is required to seek and compile comments from the Corps, the Fish and Wildlife Service and, where appropriate, National Marine Fisheries and submit a consolidated federal response on the permit application from all agencies. EPA could not approve a state program where the permit review process did not allow

adequate time for the federal review comments. The extent to which this is a problem may depend on Florida's definition of a "complete application" and EPA's willingness to accept a less than "complete application" for the federal oversight review process.

- Based on a recent review of the Underground Injection Control program delegated to FDER under the Safe Drinking Water Act, there are apparent differences in public participation provisions between Florida statutes and federal law, including the length of public comment period, response to comments, opportunity for hearing, and to whom notice is provided. This issue would require an in-depth legal analysis in order to determine specific differences between the State and federal requirements.

Limitations of Assumption

Another issue which may influence the State's interest in assuming the program is the statutory limitation that states are not eligible to assume jurisdiction over "waters which are presently used, or are susceptible to use in their natural condition [for navigation] ... including all waters which are subject to the ebb and flow of the tide... including [adjacent] wetlands..." These are known as "non-assumable waters." A large percentage of the waters in the State are not assumable by the State under the present CWA statute. It is up to Congress to enact changes to the CWA that would allow the states to assume authority for navigable waters.

We have discussed with the FDER Water Management Division the possible option of a State Program General Permit (SPGP) whereby the State could co-administer the Corps permitting program for "non-assumable" waters. North Carolina has a similar arrangement in their coastal zone. This option is dependent on Corps support and approval. The concern expressed by FDER is that the state-assumed program would be governed by state regulations whereas the SPGP program would be governed by EPA and Corps regulations. This would, at a minimum, cause difficulties in implementation of the program and in staff training.

I hope this responds adequately to your request. If I can be of further assistance, please don't hesitate to contact me again.

Sincerely yours,

Original Signed By:

Greer C. Tidwell
Regional Administrator

Coordination:
Vanderhoogt KMV Ungarro * Miller * Ahern
Howell McGhee * Cunningham
12-20-91 Vandy disk 404General#2

12/23/91

* Ungarro, Miller, & McGhee all reviewed and approved the previous draft of this letter. (See file for copies they reviewed.) They are all out of office for whole week. Final being circulated without their initials for this reason. KMV